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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-523

EDDIE LEE FRAISER,
Petitioner,

-vs-

STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ON BRIEF

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QUESTIONS PRESENTED

Whether a police officer, who arrests a motorist for a motor vehicle violation for which the motorist has the privilege of immediate release upon a promise to appear, has the right to conduct a search incident to that arrest and whether a passenger riding with such a motorist has standing to challenge a search

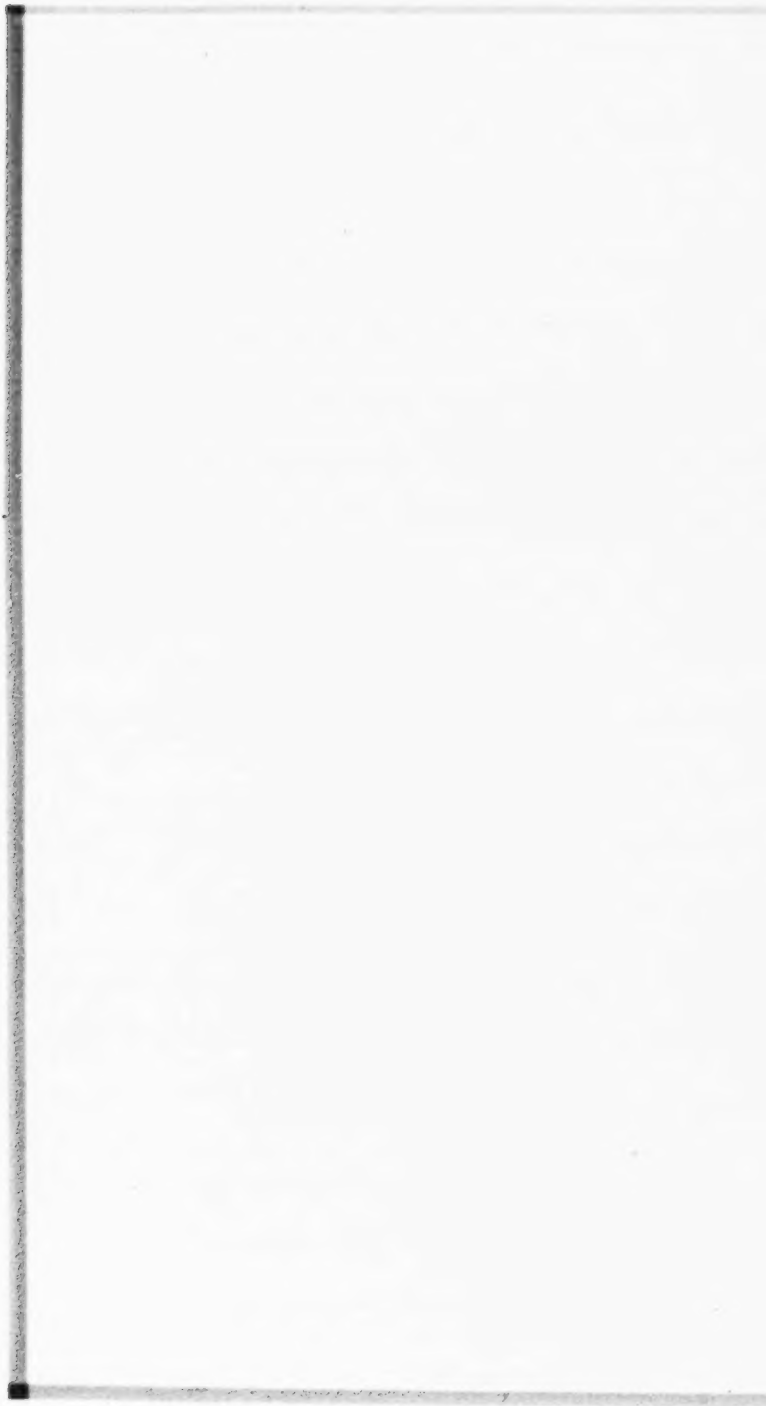
of the vehicle incident to the motorist's arrest.

Whether a confrontation between a suspect and his supposed victims on the scene of the suspect's apprehension, soon after the crime, is impermissibly suggestive because it focuses the victims' attention upon the suspect.

Whether a statement of a non-evidentiary nature by a bailiff to a jury denies a defendant a fair trial by an impartial jury.

SUMMARY OF THE ARGUMENT

The petitioner does not have standing to challenge the search of the vehicle, in which he was riding, incident to the arrest of the driver. There is no privilege of release on promise to appear in court on a charge



of improper equipment, namely a defective muffler. It is proper to search a vehicle incident to an arrest if a suspect could seize a weapon or destroy evidence in the vehicle. Even if there were a privilege of release, the search incident to the arrest would have been reasonable since it would have been necessary to take custody of the driver temporarily. If the petition were successful, the only items that would be suppressed would have been harmless.

The on-the-scene confrontation between the petitioner and his victims was not impermissibly suggestive. The exigencies of the circumstances justified the procedure,

and the comments of the police officers did not bias the procedure.

The bailiff's statement to the jury was nonevidentiary in nature. There is no evidence that the statement prejudiced the jury's deliberations or influenced the decision regarding guilt. The bailiff's mistake did not deny the petitioner a fair trial.

ARGUMENT

I.

THE SEARCH INCIDENT TO THE ARREST WAS PROPER

The first contention of the petitioner (hereinafter "defendant") is that the search of the automobile in which the defendant was riding was not justifiable as a search incident to a lawful arrest because the arrest

was for a motor vehicle violation for which a "full custodial arrest" was not possible and because a search of the vehicle would not have been justified even if the search incident to the arrest were proper. (Petition for Writ of Cert., pp.18-36.)

Note initially that the defendant has no standing to raise the issue. He was not the one arrested at the time of the stop. Nor is there any suggestion in the record that he owned or was in possession of the automobile. Brown v. United States, 411 U.S. 223, 229, 93 S.Ct. 1565, 1569, 36 L.Ed.2d 208 (1973); United States v. Sullivan, 488 F.2d 138 (5th Cir. 1973).

Nevertheless, granting arguendo

that the defendant's characterization is correct that he was the victim of an improper search incident to an arrest, his contention still must fail.

It is proper to search an automobile incident to an arrest if it appears that a suspect may have access to weapons or to evidence within the automobile. Coolidge v. New Hampshire, 403 U.S. 443, 461 n.18, 91 S.Ct. 2022, 2035 n.18, 29 L.Ed.2d 564 (1971). In point of fact, when the arresting officer first looked into the automobile he observed a tire tool, protruding from a sack. (Tr.pp.238,39.) A tire tool could have been a weapon which posed serious threat to the officer. As

a matter of law, whether he perceived a threat is immaterial, since the Court has stated that it will not play the game of analyzing an officer's subjective intent.

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based upon probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, no further justification is needed. United States v. Robinson, 414 U.S. 218. 94 S.Ct. 467, 477,38 L.Ed.2d 427 (1973); see also Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 491, 38 L.Ed.2d 456 (1973).

The defendant contends that a search incident to an arrest is impossible if the arrest is not a

"full custodial arrest" and indicates his belief that a "full custodial arrest" is one in which a police officer can "haul a motorist off to the stationhouse." (Petition for Writ of Cert., p.24.)

The automobile in which the defendant was riding was stopped because its defective muffler constituted a violation of Burns Ind.Stat.Ann. IC 9-8-6-36 (1973 Cd.ed.) (mufflers, prevention of noise). That violation is a misdemeanor, Burns Ind.Stat.Ann. IC 9-8-6-4 (1973 Cd.3d.) (violation-penalty), for which the violator is subject to arrest by any law enforcement officer witnessing the violation. IC 35-1-21-1, Burns Ind.Stat.Ann. §9-1024 (1956 Repl.) (peace officers—

power to arrest). The defendant contends that a full custodial arrest could not have been effected for that violation because of Burns Ind. Stat.Ann. IC 9-4-1-131(a) and (d) (1973 Cd.ed.), which provide:

> (a) Whenever a person who is a resident of this state is arrested for any violation of this act (9-4-1-1—9-4-1-138) punishable as a misdeameanor, and such person is not immediately taken before a magistrate as hereinbefore provided, the arresting officer shall prepare in duplicate written notice to appear in court containing the name and address of such person, the license number of his vehicle, if any, the offense charged, and the time when and the place where such person shall appear in court.
>
> . . .
>
> (d) The arrested person in order to secure release, as provided in this section, must give his written promise so to appear in court by signing in duplicate the written notice prepared by

> the arresting officer. The original of said notice shall be retained by said officer and the copy thereof delivered to the person arrested. Thereupon, said officer shall forthwith release the person arrested from custody.

Those provisions do not apply to the violation in this case since the privilege of release is expressly limited to violations of Burns Ind. Stat. Ann. IC 9-4-1-1 to -138 (1973 Cd.ed.).

Even if it did apply, a search still would have been proper. The arrest was a custodial arrest. Although it is true that the arresting officer had no right to continued custody of the driver, he did have a right to temporary custody. That "right" was based upon probable cause to believe there had been a violation

of the law. The driver was, in fact, in the custody of the arresting officer because of the arrest. The movements of the driver of the vehicle were restricted, and force could have been used, if necessary, to enforce that restriction. The facts of this case dispel any doubt that the danger to an arresting officer is as great in a "temporary custody" arrest as in any custodial arrest situation. There is no reason to retreat from the statement in United States v. Robinson, supra, that "(i)t is the fact of a lawful arrest which establishes the authority to search." Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) does not present any more cogent a

standard to test searches incident to arrests which permit only temporary custody than it does with respect to arrests of longer termed duration. It is evident that the Indiana General Assembly did not intend that provisions for release of violators of certain motor vehicle regulations would restrict an arresting officer's handling of the violators in custody. The General Assembly expressly provided that action may be taken against the arresting officer for abrogation of the privilege. See Burns Ind.Stat.Ann. IC 9-4-1-131 (e) (1973 Cd.ed).

The defendant's attempt to suppress all evidence taken from the vehicle and evidence of the gunfight

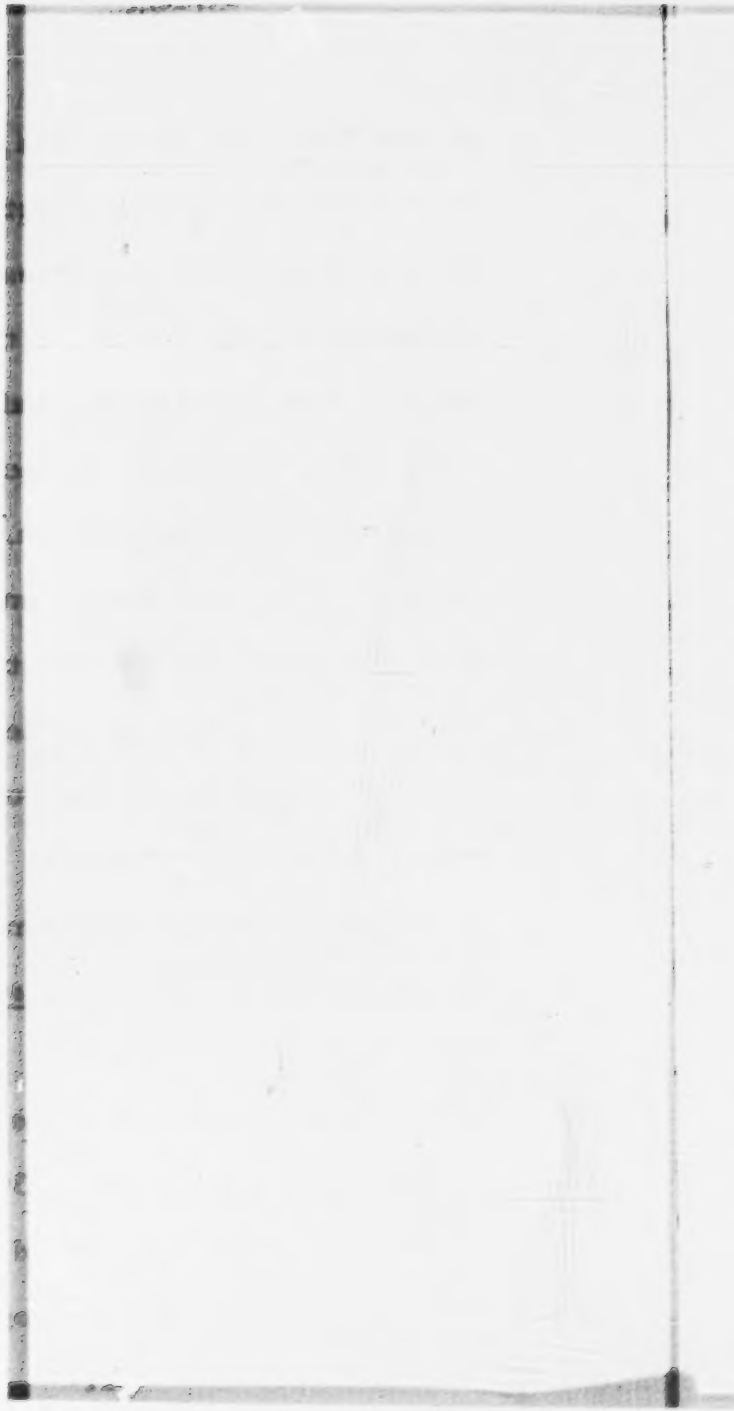
is unrealistic. The only items which could be suppressed, if the defendant were successful, would be the rubber gloves found in the sack. The tire tool was in plain view. A request for a license is a search necessarily concomitant to an arrest for a motor vehicle violation. Evidence of the gunfight could not have been the "fruit" of the search of the automobile. It is not sufficient that evidence would not have been obtained "but for" illegal police conduct. The evidence must have resulted from intentional exploitation of the conduct and not, as here, from the defendant's independant acts. Wong Sun v. United States, 371 U.S. 471, 486-88, 83 S.Ct. 407, 416-18, 9 L.Ed.

2d 441 (1963). Reversal based upon the improper admission of the rubber gloves into evidence would not be warranted since such an error would have been harmless.

II.

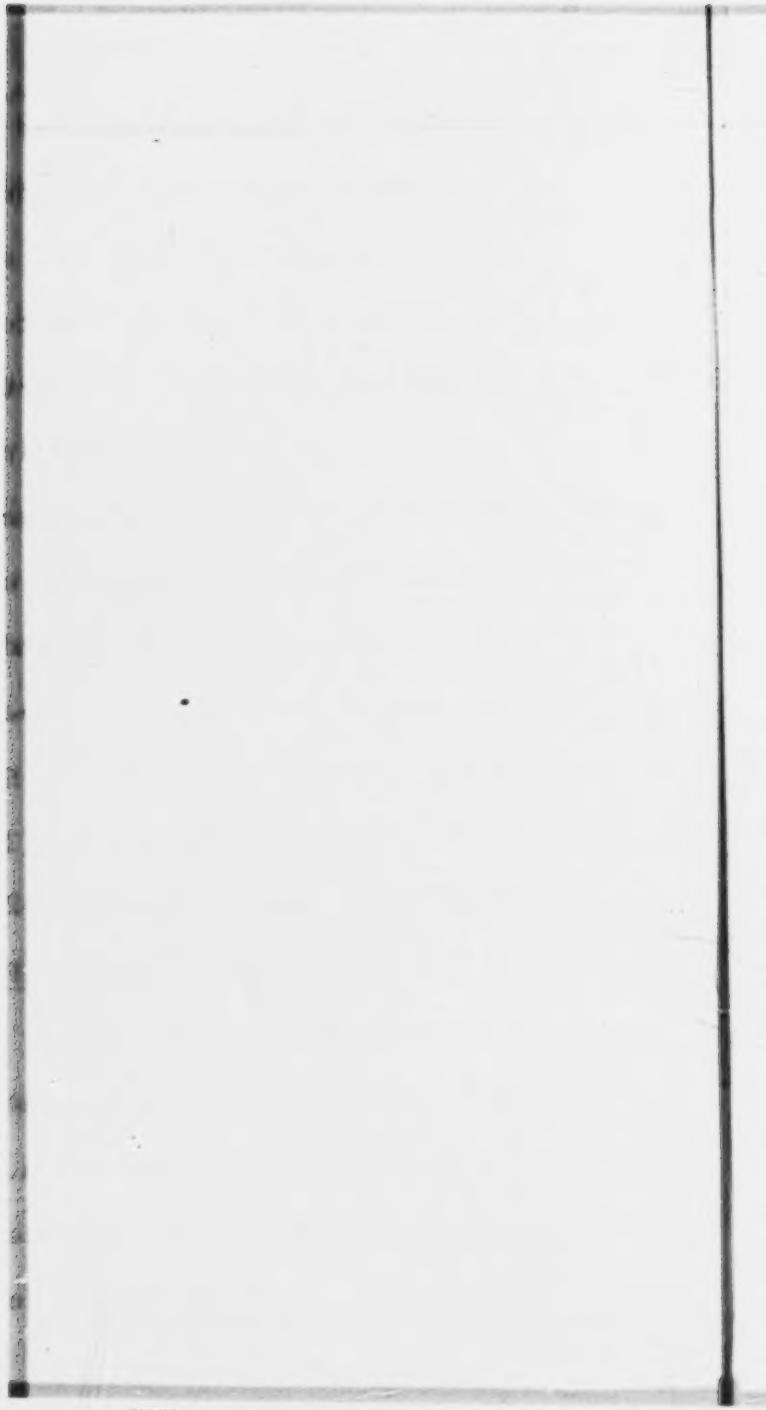
THE ON-THE-SCENE CONFRONTATION WAS NOT IMPERMISSIBLY SUGGESTIVE

The second contention of the petitioner (hereinafter "defendant") is that the confrontation between the defendant and his victims, at the scene of his apprehension, soon after the robbery, was impermissibly suggestive because it singled-out the defendant and because the police biased the confrontation by stating that the defendant was suspected of the robbery. (Petition for Writ of Cert., pp.37-43.) The question to be



answered to determine whether identification procedures on the scene of the crime or arrest were too suggestive is whether, in light of the totality of the circumstances, the on-the-scene confrontation was conducted in a manner so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process. Stovall v. Denno, 388 U.S. 293, 301, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967); Wright v. State, ___Ind.___, 285 N.E. 2d 650, 653 (1972). Rudd v. Florida, 477 F.2d 805 (5th Cir. 1973), is inapposite since it does not deal with an on-the-scene confrontation.

It is improper for police to bias confrontations by focusing identifi-



cation witnesses' attention upon a suspect by stating that the suspect is believed to have committed the crime. Granted argeundo that the police did that in this case, there was no prejudice because the victims knew the defendant and, as one of the victims testified, they were not influenced by anything the police said that night. United States v. Allen, 497 F.2d 160, 163 (5th Cir. 1974); United States v. Anderson, 490 F.2d 785, 787 (D.C. Cir. 1974).

Nevertheless the confrontation was not impermissibly suggestive. The identifications were reinforced by the facts that the defendant and his accomplice were dressed in the manner described by the victims, (Tr.pp.356-

57, 521), and that the defendant's walk and voice seemed distinctly familiar to the victims at the time of the robbery. (Tr.pp.356-57,521.) The exigencies of on-the-scene confrontations and society's strong interest in rapid identifications following crimes justify distinguishing confrontations on the scene of an apprehension of a suspect soon after a crime from "one-on-one" identification procedures arranged in nonexigent circumstances. United States v. Lee, 485 F.2d 1075, 1076-77 (D.C. Cir. 1973). Consequently it is not impermissibly suggestive to seek an identification on the scene of an arrest soon after a crime even though the defendant alone is to be viewed. cf. Stovall v. Denno, supra.

III.

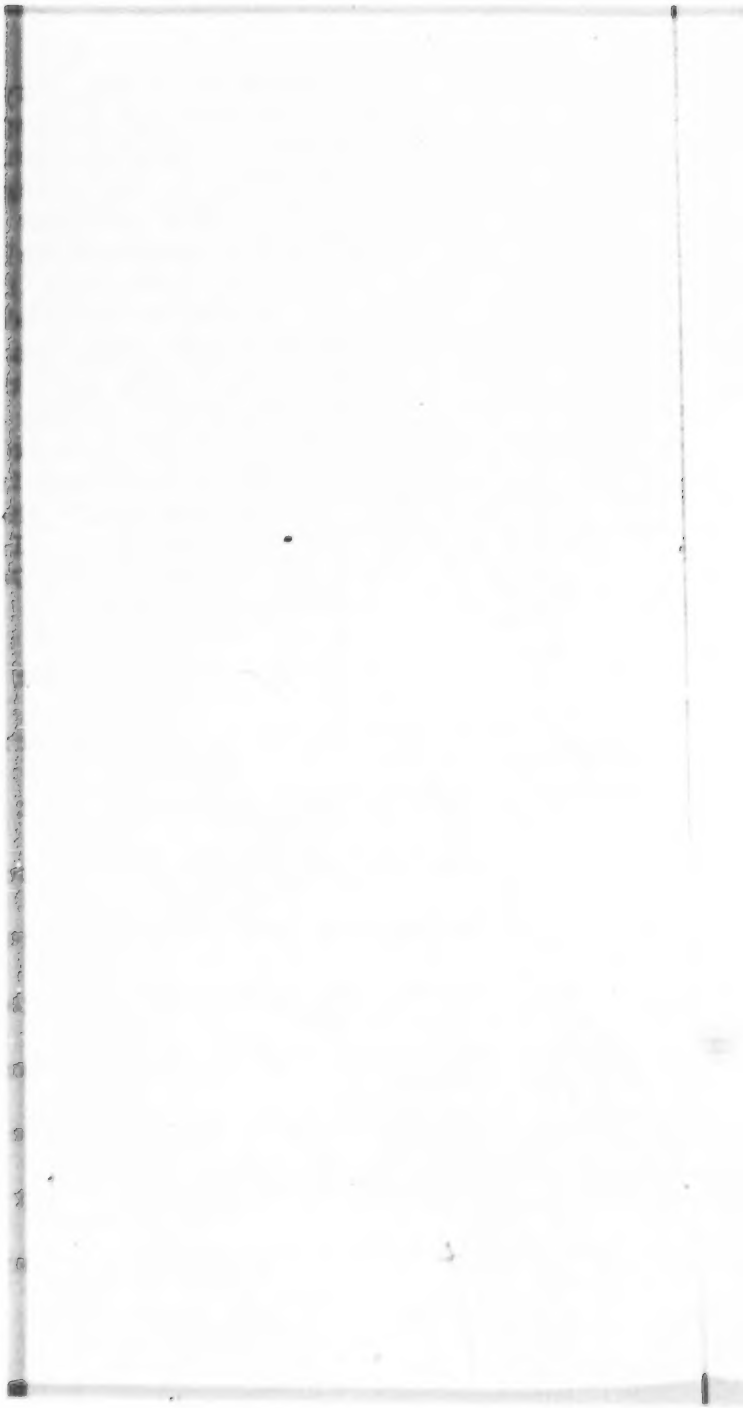
THE BAILIFF'S STATEMENT TO THE JURY DID NOT DENY A FAIR TRIAL

The third contention of the petitioner (hereinafter "defendant") is that the jury was prejudiced by remarks of the bailiff. (Pet. for Writ of Cert., pp.43-49.) The defendant cites no authority in support of his contention and has presented nothing that merits review by the Court. Although the Indiana Supreme Court reviewed the merits of the defendant's contention, it did so in spite of the questionable nature of the record upon which review was sought. Specifically, the Court noted:

> Appellant's attorney has submitted an affidavit that through an undescribed source Appellant's attorney learned during the de-

> liberation of the jury that the bailiff had had an improper conversation with the jury. Specifically, it is alleged that a juror asked whether sentences would run consecutively or concurrently. The bailiff said he would speak to the judge. He did, and the judge instructed him to tell the jury that the question could not be answered. Instead the bailiff told the jury that the sentencing of the defendant was up to the judge. Fraiser v. State, ___Ind.___, 312 N.E.2d 77, 81 (1974); see also Tr.pp.16-18.

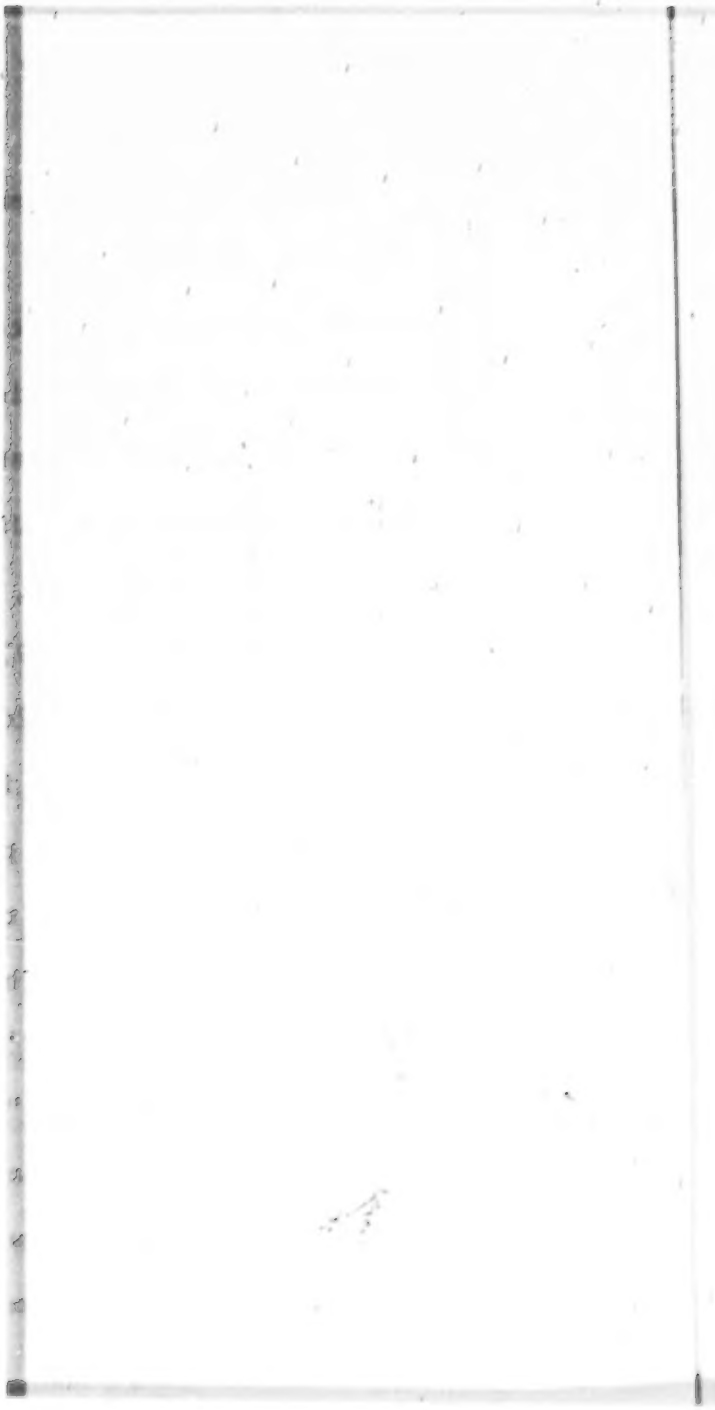
In fact, the defendant was informed of the bailiff's mistake prior to the announcement of the verdict and did not call it to the trial court's attention. As a consequence, there is no concrete evidence regarding the effect of the bailiff's comment. Factually this is not a case in which evidence reached the jury from outside the courtroom. e.g., Parker v.



Gladden, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966).

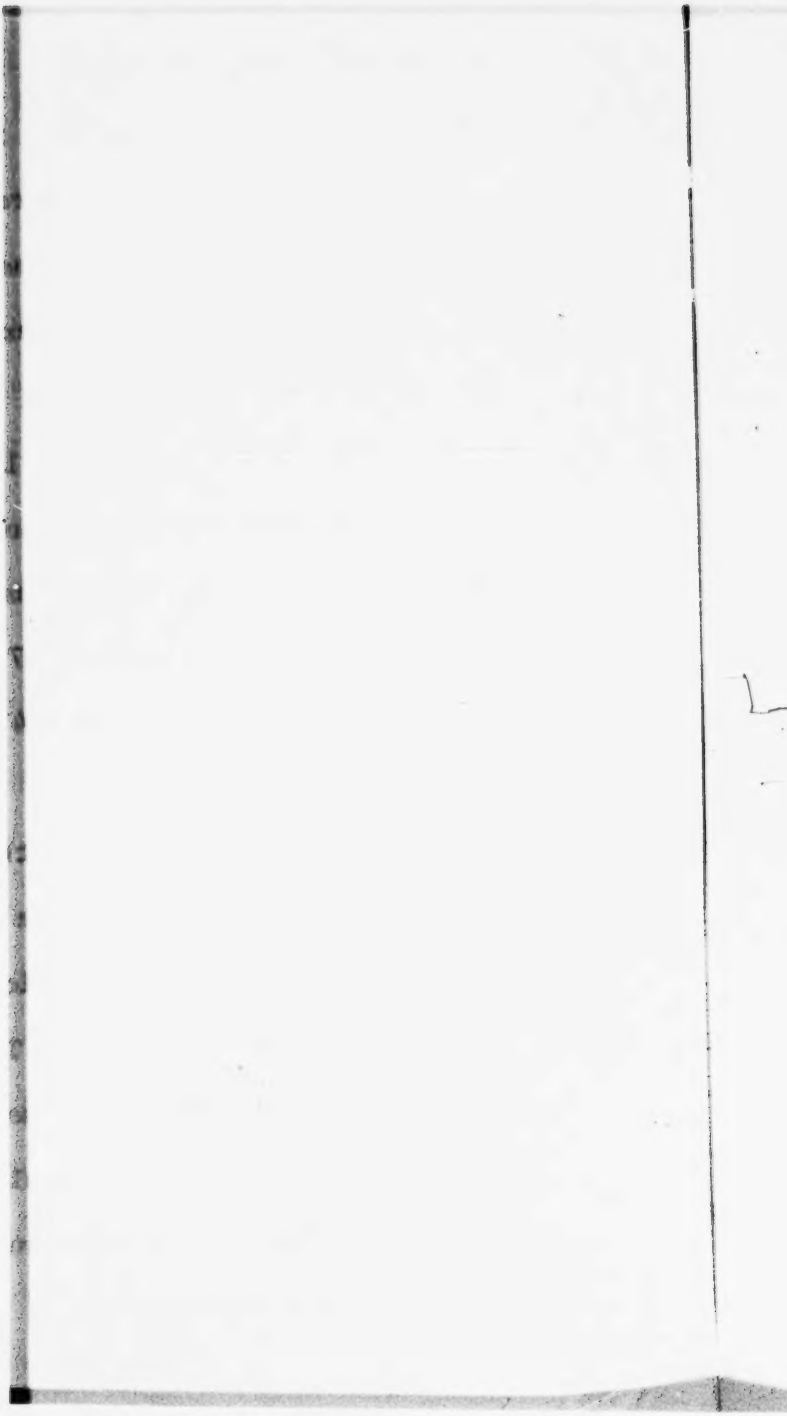
Outside influences impinging upon a jury are presumed to be prejudicial. However, consistent with the weight of authority in other jurisidictions, the rule in Indiana is that the presumption is rebuttable. United States ex rel. Tobe v. Bensinger, 492 F.2d 232, 238 n. 8 (7th Cir. 1974); Frasier v. State, supra, 312 N.E.2d at 81-82.

The record presented in this case sufficiently rebutted the presumption since it demonstrated, as the Indiana Supreme Court concluded, that "'no harm or prejudice resulted' from the misconduct of the bailiff." Alternatively the court could have held that the record presented was insufficient to raise the presumption, since



it merely contained hearsay and did not contain "hard evidence" from jurors stating that they were the objects of outside influences, e.g., Parker v. Gladden, supra; Marshall v. United States, 360 U.S. 310, 312, 79 S.Ct. 1171, 1172, 3 L.Ed.2d 1250 (1959), or from witnesses who indicated that they were "outside influences." e.g., Turner v. Louisiana, 379 U.S. 466, 468-71, 85 S.Ct. 546, 547-49, 13 L.Ed.2d 424 (1965).

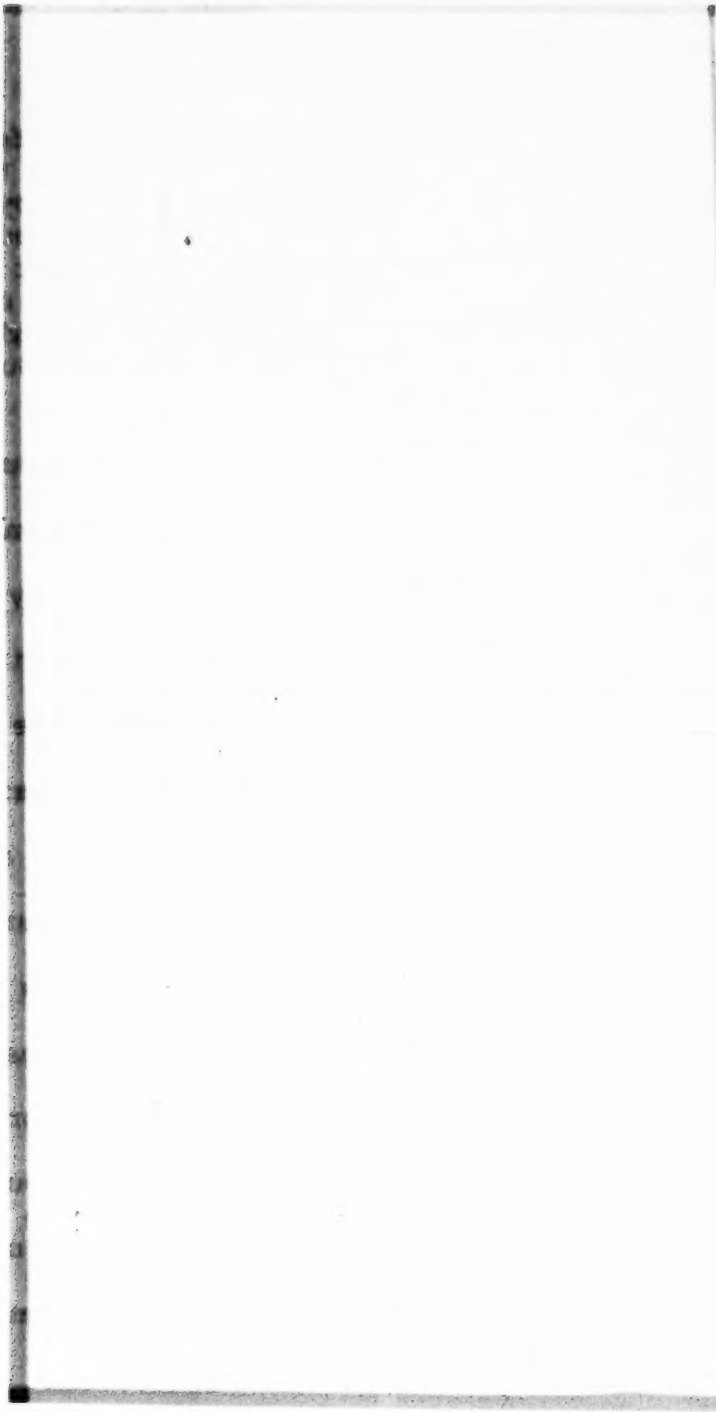
The defendant has submitted nothing that implies that the bailiff's message influenced the decision of the jury with respect to guilt. The information would have been material only to sentencing. So speculative is that defendant's contention that, in the Indiana Supreme Court, the



defendant argued:

> The fact that the defendant received from the jury the maximum sentences allowed by law could very well have been predicated on the jury's view that the Judge would reduce the sentence anyway. (Brief of Defendant-Appellant in the Ind. Sup. Ct., p. 38.)

Granting the defendant's imputation of prejudice, the only reasonable explanation of that action by the jury is that the jury was attempting to persuade the court to impose the maximum sentence. To be balanced against the defendant's bald speculation are the facts that the court had accurately instructed the jury about its sentencing responsibility and that the jury had before it verdict forms which revealed on their faces the punishment to be inflicted. As a consequence the only defensible conclusion that



can be drawn from the record is that the defendant was not prejudiced by the bailiff's mistake. The defendant has a right to "a fair trial by a panel of impartial, 'indifferent,' jurors," Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961), and the defendant has submitted nothing to indicate that he did not receive such a trial.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ON BRIEF

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